

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRIAN HAMMER,

Defendant.

No. 2:02-cr-00353-GEB

**ORDER DENYING MOTION TO
DETERMINE AMOUNT OF RESTITUTION**

On July 30, 2015, Defendant filed, in pro per, a motion under 18 U.S.C. § 3664(j)(2) in which he "requests to have a hearing set to determine the amount of restitution presently owed by the Defendant." (Def.'s Mot. Determine Amount Restitution ("Mot.") 1, ECF No. 131.) In essence, Defendant contends that the "Investment Table" set forth in paragraph 8 of the Presentence Report ("PSR"), which "provided the factual basis for the court's determination of . . . restitution[,]" incorrectly states the amounts invested by the victims and incorrectly reports the amounts paid to the victims in a civil lawsuit, which were used to offset the restitution award. (Id. at 2.) Defendant argues:

[On November 5, 2004, t]his court sentenced Mr. Hammer to 36 months incarceration, followed by two years of supervised release and restitution in the amount of \$35,000.00.

On May 17, 2002, in a civil case concerning the same set of circumstances upon which the Defendant was convicted, a

1 settlement agreement was concluded. A payment
 2 . . . to James and Carol Holloway, victims of
 3 the fraud, . . . [and a] payment for . . . to
 4 Patrick Folliott, an additional victim of the
 5 fraud, w[ere] simultaneously paid
 The[se] payments represented the entirety of
 the[victims'] "investments" with the
 defendant and are described within the PSR,
 "Investment Table", shown therein.

6 The PSR "Investment Table" shows the
 7 Holloways . . . "investment" as \$75,000.00
 8 and Folliott as \$40,000.00, respectively.
 Both entries are . . . incorrect

9 Additionally, it has come to the
 10 attention of the defendant, that the amounts
 11 paid over in the civil lawsuit brought by the
 12 victims in this case, are incorrectly
 13 reported in the PSR. It is clear, the PSR
 14 "Investment" table provided the factual basis
 for the court's determination of the
 restitution balance. That being said, the
 settlement amounts paid over to the victims
 and the corresponding restitution judgment
 are the gravamen of the motion.

15 The defendant is currently required to
 16 pay restitution in an approximate amount of
 17 \$37,380.40 to victims James and Carol
 18 Holloway and Patrick Folliott. However, the
 amount owed by the defendant, Brian Hammer to
 the victims may be reduced at the District
 Court's discretion under 18 U.S.C. Section
 3664(j)(2)

19 (Id. at 1-2 (citation and heading omitted).)

20 PROCEDURAL HISTORY

21 The following procedural history concerns this motion.
 22 Defendant was found guilty by jury verdict on Counts 1 through 17
 23 of the Indictment on March 31, 2003. (ECF No. 53.) The
 24 Presentence Report ("PSR") is dated July 25, 2003, and includes
 25 information concerning restitution at paragraphs 8-9. Paragraph 8
 26 includes a table reflecting the amounts invested by certain
 27 victims and the amounts those victims received in a civil
 28 settlement. Probation's recommendation that Defendant be ordered

1 to "pay restitution in the amount of \$35,000" is on page 16 of
2 the PSR. Defendant filed formal objections to the PSR on August
3 15, 2003; however, Defendant did not object to the information
4 contained in paragraphs 8 or 9 of the PSR or Probation's
5 recommendation regarding the amount of restitution. (Def.'s
6 Formal Objs. & Sentencing Mem.¹) Defendant was sentenced on
7 August 22, 2003. Defendant did not object to the referenced PSR
8 paragraphs or Probation's recommendation concerning the amount of
9 restitution at the sentencing hearing. (Tr. J. & Sentencing.²)

10 Defendant appealed his conviction and sentence. (See
11 ECF No. 76.) On appeal, the Ninth Circuit granted the parties'
12 joint motion for remand and resentencing. (Mandate, Sept. 27,
13 2004.³) The Ninth Circuit's Mandate states: "The Joint Motion for
14 Remand and Re-Sentencing is hereby GRANTED. The cause is remanded
15 to the district court for sentencing pursuant to the joint
16 agreement and stipulations, and the case is withdrawn from
17 submission." (Id.)

18 Defendant was resentenced pursuant to the Ninth
19 Circuit's Mandate on November 5, 2004.

20 DISCUSSION

21 18 U.S.C. § 3664(j)(2) prescribes: "Any amount paid to
22 a victim under an order of restitution shall be reduced by any
23 amount **later** recovered as compensatory damages for the same loss
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25 ¹ A copy of Defendant's "Formal Objections and Sentencing Memorandum" is
attached hereto.

26 ² A copy of the transcript of the August 22, 2003 motion hearing,
27 judgment, and sentencing is attached hereto.

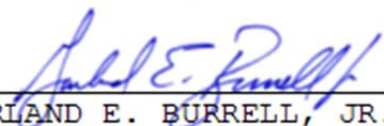
28 ³ A copy of the Ninth Circuit's September 27, 2004 Mandate is attached
hereto.

1 by the victim in . . . any State civil proceeding, to the extent
2 provided by the law of the State." (emphasis added). "Section
3 3664(j)(2) 'applies only to compensatory damages recovered by a
4 victim in a civil proceeding **after** a court enters a restitution
5 order.'" United States v. Banks, 62 F. Supp. 3d 125, 131 (D.D.C.
6 2014) (quoting United States v. Joseph, 743 F.3d 1350, 1355 (11th
7 Cir. 2014)).

8 Defendant has not shown that § 3664(j)(2) may be used
9 to reduce the amount of restitution ordered in this case since
10 the referenced civil settlements predated the restitution award
11 and were specifically referenced in the PSR. "The issue of
12 offsetting **pre-sentencing** compensation to a victim . . . is to be
13 addressed at the time of sentencing" Id. at 133 (emphasis
14 added). However, Defendant did not object to the amounts stated
15 in the PSR's "Investment Table" nor Probation's recommendation
16 concerning the amount of restitution at any time prior to his re-
17 sentencing. Therefore, Defendant's motion is DENIED.

18 Further, in light of this ruling, the Court need not
19 decide Defendant's "Application to Proceed . . . Without
20 Prepaying Fees or Costs," (ECF No. 132).

21 Dated: September 11, 2015

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25 GARIAND E. BURRELL, JR.
26 Senior United States District Judge
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